



U.S. Department of Transportation
Federal Transit Administration

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**Proposed FTA Guidance on the Application of 49 U.S.C. § 5323(q) to
Corridor Preservation for a Transit Project**

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Background

Section 20016 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) amended Federal transit law by adding a new provision at 49 U.S.C. § 5323(q) that allows the Federal Transit Administration (FTA), under certain conditions, to assist in the acquisition of right-of-way (ROW) before the completion of the environmental review process, as defined in 23 U.S.C. § 139(a)(3), for any transit project that eventually will use that ROW. The new provision, effective on October 1, 2012, states:

(q) CORRIDOR PRESERVATION.—

(1) IN GENERAL.—The Secretary may assist a recipient in acquiring right-of-way before the completion of the environmental reviews for any project that may use the right-of-way if the acquisition is otherwise permitted under Federal law. The Secretary may establish restrictions on such an acquisition as the Secretary determines to be necessary and appropriate.

(2) ENVIRONMENTAL REVIEWS.—Right-of-way acquired under this subsection may not be developed in anticipation of the project until all required environmental reviews for the project have been completed.

Prior to October 1, 2012, FTA only allowed corridor preservation of pre-existing railroad ROW for a future transit project prior to completion of the environmental review process for that project, pursuant to the former 49 U.S.C. § 5324(c). Section 20016 of MAP-21 created a substantially similar provision in 49 U.S.C. § 5323(q), but removed the word “railroad.”

MAP-21 did not, however, change the prohibition on the acquisition of real property that is not “right-of-way” prior to the completion of the environmental review process for the transit project unless conditions for certain exceptions (hardship and protective acquisitions) are met. See 23 CFR § 771.113(a). This guidance is intended to address the conditions on corridor preservation under 49 U.S.C. § 5323(q), including FTA’s definition of ROW for that purpose. This guidance also provides information on the expectations and requirements for such acquisition of ROW prior to compliance with the National Environmental Policy Act (NEPA) for the project that will occupy the ROW. This guidance does not address the long-standing use of hardship or protective acquisitions, which are described in FTA’s NEPA regulation at 23 CFR 771.118(d)(3).

Definition of *Right-of-Way*

Question 1: What is the meaning of the term “right-of-way” in the context of corridor preservation permitted by 49 U.S.C. § 5323(q)?

Answer 1: In the context of corridor preservation permitted by 49 U.S.C. § 5323(q), FTA will consider ROW to be land that is generally linear in configuration. A generally linear

configuration is supported by Webster's Dictionary,¹ which defines *right-of-way* as "the area over which a legal right of passage exists; the strip of land over which is built a public road; the land occupied by a railroad; the land used by a public utility (as for a transmission line)." FTA generally considers ROW for the purpose of corridor preservation under this provision to be any real property in a linear configuration needed for a core capacity improvement project, a corridor-based bus rapid transit (BRT) project, a fixed guideway BRT project, or a new fixed guideway capital project, as these terms are defined in 49 U.S.C. § 5309(a), or for a fixed guideway state of good repair project as described in 49 U.S.C. § 5337. See 49 CFR 611.105. FTA defines ROW to also include stations, and any facilities associated with stations such as platforms, tail tracks, bus transfer areas, and park-and-ride lots, based on the fact that stations encompass the "rights of way" for transit riders on the project.

Question 2: What are some examples of ROW acquisitions that would be allowed under this guidance?

Answer 2: Acceptable forms of ROW would include, but are not limited to:

- A pre-existing linear ROW such as an existing railroad ROW needed for a transit project;
- The existing median of a roadway; or
- ROW formed by assembling nonlinear parcels of real property into a generally linear configuration.

Common examples² are:

Example A: A Light Rail Transit (LRT) line has segments that are single-tracked and other segments that are double-tracked. The project sponsor plans to double-track the entire line to promote safety and operational efficiency. The ROW needed for this project may be acquired under this guidance, even though each parcel acquired is not continuously linear over its entire length.

Example B: An LRT project is planned along an existing freight rail ROW, but it will run on new tracks separate from the freight tracks. The freight operator that owns the railroad ROW requires that there be a 50-foot separation of the freight and passenger tracks to limit that freight company's liability and insurance costs. A line drawn 50 feet from the existing tracks overflows in many places onto adjacent properties. A partial or, where needed, full take of these adjacent properties to preserve a corridor wide enough for the future LRT project would be allowed under this guidance.

Example C: A future BRT project requires the addition of a lane along an existing roadway to maintain an acceptable traffic level-of-service. The street ROW varies in width and automobile

¹ Webster's New Collegiate Dictionary, G. and C. Merriam Co., 1979.

² Actual FTA-assisted projects that are similar to the examples described include: Baltimore Central LRT Double-tracking, WMATA Green line to Greenbelt, King County Seattle BRT Project, Charlotte South LRT, and Jacksonville BRT.

parking provisions, and in some places is wide enough for the additional lane, but in other places, it is not. Wherever the street ROW is not wide enough to accommodate the additional lane for BRT, partial takes or, where necessary, full takes of the abutting properties would be allowed under this guidance to create a linear configuration for the future BRT project.

Example D: An existing LRT project that operates with 2-car consists is becoming overcrowded during peak hours, and in the near future, 3-car consists will be needed. Station platforms must be extended to accommodate the additional railcar on each train. The acquisition of the real property needed for this upgrade of the line's stations would preserve the existing linear transit ROW for higher capacity transit and therefore would be allowed under this guidance.

Example E: A project sponsor has a comprehensive plan for a regional BRT system. One of its BRT lines will be along an existing, underused roadway already owned by the State DOT. The project sponsor proposes to acquire an easement from the State DOT to use the roadway for BRT, and to acquire real property along that roadway for the future BRT stations. The ROW acquisition of the easement and station areas would be allowable under this guidance because it would preserve the corridor for a future, viable, high-capacity BRT line.

Consultation with the FTA Regional Office on whether the real property interest proposed for acquisition fits within the definition of ROW herein is essential.

Question 3: What are some examples of ROW acquisitions that would not be allowed under this guidance?

Answer 3: Real property that is needed for a stand-alone project that is not associated with a new or improved linear transit project and real property needed for ancillary facilities associated with a new or improved linear transit project that would be located outside of the ROW would not qualify for corridor preservation. Examples include a new or expanded bus storage and maintenance facility for mixed-traffic, street-running buses; a bus transfer center or intermodal center for mixed-traffic, street-running buses not associated with a linear facility as defined above; or real property needed for traction power substations outside of the ROW for a LRT system. For these nonlinear transit facilities, FTA allows the advance acquisition of a limited amount of real property only for hardship or protective purposes as defined in the FTA environmental regulation at 23 CFR § 771.118(d)(3). In the absence of either one of these two exceptions, the ROW acquisition for a nonlinear project must await completion of the environmental review process for the project that will use the ROW pursuant to 23 CFR § 771.113(a).

Section 5323(q) provides a tool for corridor preservation, an activity that is carried out in anticipation of future transit service needs. In consideration of the substantive requirements and administrative processes for FTA's formula and discretionary funding programs, once the NEPA review of a proposed project is initiated, corridor preservation would not be appropriate and FTA would not assist in any such acquisition. If a project sponsor uses local funds to acquire property after initiation of the NEPA process for corridor preservation or of property not considered to be

“right-of-way” under this guidance at any time,³ FTA would need to take steps appropriate under the particular circumstances to ensure the objectivity of the NEPA process for a proposed project.

Question 4: For a linear transit project, some parcels of real property may be needed for park-and-ride lots, traction power substations, vehicle storage and maintenance facilities, or other project elements that may be separated from the linear portion of the project by a street or even by one or more city blocks. May these other needed parcels be acquired as part of the corridor preservation under 49 U.S.C. § 5323(q)?

Answer 4: Maybe. FTA generally will define ROW to include stations along a linear alignment and facilities immediately adjacent to and associated with stations. This definition could include traction power substations and park-and-ride lots if they are incorporated into the station footprint or within the linear ROW needed for the fixed guideway project. FTA would not permit the corridor preservation for traction power substations, vehicle storage and maintenance facilities, and other facilities outside of the defined linear ROW or adjacent station footprint.

Environmental Reviews of the ROW Acquisition and Subsequent Transit Project

Question 5: Is the corridor preservation under 49 U.S.C. § 5323(q) subject to an environmental review by FTA and the project sponsor, pursuant to NEPA (42 U.S.C. §§4321-4335) and all other applicable Federal environmental laws, regulations, and executive orders?

Answer 5: If the ROW is to be acquired with FTA financial assistance, an environmental review of the ROW acquisition itself must be completed by FTA and the project sponsor in accordance with NEPA and all other applicable Federal environmental laws and regulations.

In addition, if the project sponsor used FTA funding for the ROW acquisition for corridor preservation, the ROW must not be altered or encumbered in any way without FTA’s prior written approval. See 49 CFR 18.31(b) and 19.32 regarding the encumbrance of real property in which there is a Federal financial interest.

Question 6: Does FTA consider the separate environmental review of corridor preservation under 49 U.S.C. § 5323(q) to be impermissible segmentation?

Answer 6: No. FTA will consider corridor preservation to be a separate action from the future transit project that will ultimately be built on that ROW as the segmentation in this instance is

³ Unless the acquisition is independently justified by hardship or protective purposes as defined in the FTA environmental regulation at 23 CFR 771.118(d)(3).

specifically allowed by statute. As a separate action, the ROW acquisition itself for corridor preservation, if FTA funded, would be subject to FTA's planning and environmental requirements. The later transit project built on that ROW, if FTA funded, would also be subject to FTA's planning and environmental requirements as a separate project. See Questions 7 and 11, respectively, regarding the environmental reviews of these two separate projects.

Question 7: Would the corridor preservation under 49 U.S.C. § 5323(q) prejudice the consideration of alternatives for the future FTA-funded fixed guideway project?

Answer 7: No. Corridor preservation occurs at the project sponsor's risk and with the understanding that FTA may require that the subsequent environmental review of a proposed project consider reasonable alternative alignments that do not use the property acquired in order to comply with requirements of laws such as NEPA, Section 4(f) (49 U.S.C. § 303), Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f), and Section 404 of the Clean Water Act (33 U.S.C. § 1344). These laws may preclude FTA from approving the funding of a linear transit project unless an alternative is selected that avoids certain environmental effects. Project sponsors should complete robust planning studies that consider environmental effects prior to acquiring ROW for a future fixed guideway transit project.

Section 5323(q) provides a tool for corridor preservation, an activity that is carried out in anticipation of future transit service needs. In consideration of the substantive requirements and administrative processes for FTA's formula and discretionary funding programs, once the NEPA review of a proposed project is initiated, corridor preservation would not be appropriate and FTA would not assist in any such acquisition. If a project sponsor uses local funds to acquire property after initiation of the NEPA process for corridor preservation or of property not considered to be "right-of-way" under this guidance at any time,⁴ FTA would need to take steps appropriate under the particular circumstances to ensure the objectivity of the NEPA process for a proposed project.

Question 8: What are some examples of the environmental and community impacts that FTA and the project sponsor would evaluate in an environmental review of corridor preservation project under 49 U.S.C. § 5323(q)?

Answer 8: Examples of the environmental and community impacts that FTA and the project sponsor would need to consider before deciding to acquire ROW for corridor preservation under 49 U.S.C. § 5323(q) include the displacement and relocation of residents and businesses that own the property to be acquired, the extent and nature of contamination of soil and groundwater on the ROW, and the presence of historic resources, parks, wetlands, bodies of water, prime farmland, or endangered species on the ROW. In many cases, the ROW being acquired may harbor no environmentally sensitive resource. In these cases, with appropriate documentation, FTA would consider whether a categorical exclusion (CE) is the appropriate level of NEPA review for the proposed corridor preservation project in accordance with FTA's NEPA

⁴ Unless the acquisition is independently justified by hardship or protective purposes as defined in the FTA environmental regulation at 23 CFR 771.118(d)(3).

regulation at 23 CFR part 771. Consultation with the FTA Regional Office on the appropriate scope of the NEPA evaluation and related laws is essential.

Question 9: If the project sponsor plans to acquire the ROW entirely with non-Federal funds, does this statutory provision apply? What FTA requirements, if any, must be followed in this situation?

Answer 9: If real property fitting the definition of ROW in this guidance is to be acquired without FTA financial assistance for corridor preservation, an FTA environmental review of the ROW acquisition itself is not required. However, if the project sponsor subsequently proposes to build an FTA-assisted transit project⁵ on that ROW, FTA must be assured by the project sponsor at that time that:

- (a) The ROW was acquired, and occupants were relocated, in accordance with the Uniform Relocation Act⁶ and its implementing regulations (49 CFR part 24); and
- (b) The ROW was not altered in any way during the interim period between its acquisition and the completion of the environmental review process for the subsequent transit project as specified in 49 U.S.C. § 5323(q)(2). For example, parkland may not be converted, buildings may not be demolished, utilities may not be relocated for an anticipated project seeking FTA funds, farmland may not be graded or paved over, natural areas with the potential for habitation by endangered species may not be altered, etc. Although the ROW was acquired without FTA assistance, any change to the ROW, with the exception noted in Questions 10 and 11 below, may have circumvented a Federal requirement (e.g., anticipatory demolition of a historic building) and would render the project on that ROW ineligible for FTA assistance.

Question 10: Can the project sponsor take actions on the acquired ROW for corridor preservation under 49 U.S.C. § 5323(q) such as grading, demolitions, or utility relocations, during the interim period between its acquisition and the construction of a transit project on that ROW?

Answer 10: The statute provides that the ROW acquired for corridor preservation may not be developed in anticipation of the future transit project until all required environmental reviews for that future project have been completed. Any mitigation actions required by the environmental review of the corridor preservation project, such as a commitment to maintain historic structures

⁵ Throughout this guidance, the term “FTA-assisted project” means that FTA grant funds are devoted to any project-implementation activity such as: (a) relocations and real property acquisitions for early ROW-acquisition projects; and (b) relocations and real property acquisitions, utility relocations, demolitions, site preparation, construction, and vehicle acquisition for a transit construction project. A project is not “FTA-assisted” if FTA funds are spent only on project development and the environmental review and are not spent on the actual implementation of the project.

⁶ Throughout this guidance, the term “Uniform Relocation Act” is shorthand for the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. § 4601 et seq.).

on the ROW⁷ or to remediate contamination migrating from the ROW in stormwater or groundwater, must be followed during the interim period pursuant to 40 CFR parts 1500-1508. Any other alteration of the acquired ROW, such as demolition, site preparation, or utility work, would require a separate written approval by FTA to ensure the possibility of future funding by FTA, and may trigger other Federal requirements, such as Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f) or Section 4(f) of the Department of Transportation Act (49 U.S.C. § 303). Such approval by FTA would not be forthcoming unless very serious extenuating circumstances exist. For example, if FTA were to agree that an empty, non-historic building constitutes a fire hazard to an adjacent, occupied building, FTA may approve the demolition of the empty building after completing requirements as expeditiously as possible under environmental laws such as Section 106.

Question 11: Can the project sponsor make alternative use of the ROW acquired for corridor preservation during the interim period between its acquisition and the construction of a transit project on that ROW, such as using it for a walkway, a bicycle path, or a general-purpose utility corridor?

Answer 11: If the project sponsor were to propose an interim use of the ROW that would require its modification, FTA and the project sponsor would subject that interim use to its own separate environmental review. FTA's approval of a Record of Decision (ROD), Finding of No Significant Impacts (FONSI), or CE determination for the proposed interim use of the ROW would constitute FTA's approval of that interim use. This approach would comply with the statute, which states that the ROW acquired may not be developed in anticipation of the future transit project until all required environmental reviews for that project, in this case the interim project, have been completed. If the interim use of the ROW is reasonably foreseeable at the time of the environmental review of the proposed ROW acquisition, the environmental review of the ROW acquisition and the interim use must be combined. If the proposed interim use of the ROW is a recreational trail, adherence to Question 27 of [FHWA's Section 4\(f\) Policy Paper](#) is appropriate.

Question 12: Would an environmental review of the transit construction project on already acquired ROW preserved for the transit project be necessary?

Answer 12: If FTA will financially assist the transit project that will use the preserved ROW, the project would be subject to NEPA and related laws. Notwithstanding the acquisition of the ROW for corridor preservation, the consideration of reasonable alternatives to the proposed project still will be required during the environmental review. If the transit project that will use the ROW will not be financially assisted by FTA, then NEPA would only be applicable to the project through an action or funding by another Federal agency. For example, the non-FTA project may require a Section 404 permit by the U.S. Army Corps of Engineers, and the Corps would be responsible for NEPA compliance for its permitting decision.

⁷ If a historic structure is acquired as part of the purchase of the ROW, its maintenance may be required as a result of the consultation pursuant to Section 106 of the National Historic Preservation Act.

Metropolitan and Statewide Planning

Question 13: Is the corridor preservation project subject to FTA's metropolitan and statewide planning requirements?

Answer 13: If the ROW is to be acquired with FTA financial assistance, it is subject to FTA's metropolitan and statewide planning requirements in 23 CFR part 450. Specifically, FTA will not issue a NEPA approval for the ROW-acquisition project unless it is included in the State Transportation Improvement Program (STIP). See 49 U.S.C. § 5304(g)(5)(A). In a metropolitan area, the metropolitan planning organization (MPO) must include the corridor preservation project in the metropolitan Transportation Improvement Program (TIP), and the TIP must be consistent with the metropolitan transportation plan. See 49 U.S.C. §§ 5303(j)(1)(A) and 5303(j)(3)(A). Therefore, all FTA planning requirements must be satisfied.

Relocation Assistance and Real Property Acquisition

Question 14: What form of ROW acquisition for corridor preservation is appropriate under 49 U.S.C. § 5323(q)?

Answer 14: The acquisition may take the form of a fee-simple acquisition of the ROW, a long-term lease, the acquisition of a long-term easement within the ROW, or the long-term acquisition of trackage rights, i.e., the right to operate on the existing tracks. The term of any property right, short of a fee simple acquisition, should be of sufficient duration to cover the time needed to plan and build the proposed transit facility using the ROW and the useful life of that transit facility. The guidance for determining the minimum useful life of various transit facilities⁸ is provided in [FTA Circular 5010.1D, Grants Management Requirements \(November 2008\)](#). The requirements for FTA participation in leases are detailed in 49 CFR part 639, Capital Leases.

Question 15: Under what conditions do the requirements of the Uniform Relocation Act and its implementing regulation (49 CFR part 24) apply?

Answer 15: If the ROW is to be acquired for corridor preservation with FTA financial assistance, or if the future transit project that will use the ROW is to be financially assisted by FTA, then the project sponsor must follow applicable requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act and its implementing regulation at 49 CFR part 24. In addition, the project sponsor should follow the relevant procedures set forth in [FTA Circular 5010.1D, Grant Management Requirements \(November 2008\)](#), including the requirement for FTA review of, and concurrence in, certain property appraisals. The project sponsor should pay particular attention to the legal description of the property to be acquired.

⁸ For example, FTA C 5010.1D, Chapter IV, Subsection 3.f states that a railroad or highway structure has a minimum useful life of 50 years, and most other buildings and facilities (concrete, steel, and frame construction) have a minimum useful life of 40 years.

The project sponsor is responsible for appropriate title searches of deeds or easement documents to identify any reversion clauses, easement restrictions, and other interests that may affect the value⁹ or permissible use of the land.

Grants Management/Administration

Question 16: Should a project sponsor seek FTA financial assistance for corridor preservation under 49 U.S.C. § 5323(q) from a particular FTA program?

Answer 16: There is no particular FTA program dedicated to corridor preservation. The project sponsor may seek financial assistance for the ROW acquisition for corridor preservation from any FTA program in which this type of transit capital expense is eligible. If the project sponsor will acquire the ROW with FTA financial assistance, the normal requirements of the FTA program from which the FTA funding for the ROW acquisition would be drawn will apply.

Question 17: Do FTA policies and requirements for automatic pre-award authority apply to a corridor preservation project under 49 U.S.C. § 5323(q)?

Answer 17: FTA's policies and requirements for automatic pre-award authority would apply to corridor preservation under 49 U.S.C. § 5323(q). See FTA's most recent *Federal Register* notice on the apportionments, available at <http://www.fta.dot.gov/grants/12853.html>, for FTA's policies on automatic pre-award authority.

Question 18: If a project sponsor were to acquire ROW for corridor preservation without Federal financial assistance and without pre-award authority from FTA and then propose to use that ROW for an FTA-assisted transit project, would the value of the ROW contributed to the FTA-assisted project be an eligible expense of that project?

Answer 18: The fair market value of the ROW contributed to the FTA assisted project and appraised at the time of FTA's approval of that project generally will be an eligible expense of the FTA-assisted project if:

- (a) The ROW is not already in transit use when the FTA-assisted project is approved by FTA;
- (b) The project sponsor did not acquire the ROW after the start of the environmental review for the FTA-assisted fixed guideway project;

⁹ Throughout this guidance, "value" means the fair market value at the present time. The fair market value of ROW may change during the time between its acquisition and the construction of a project on the ROW, if sufficient time elapses.

- (c) The project sponsor has followed the conditions in Questions 10 and 11 above regarding any alterations to that ROW; and
- (d) Any other conditions for “In-Kind Contributions” provided in [FTA Circular 5010.1D, Grants Management Requirements \(November 2008\)](#) are satisfied.

It is important to note that although the project sponsor must comply with the Uniform Relocation Act if the ROW is to be used as an in-kind contribution to the FTA-assisted transit project, the cost of any relocations performed prior to FTA’s approval of a grant or pre-award authority for the project would not be counted as an eligible expense of the FTA-assisted project.

Question 19: For how long can the ROW acquired for corridor preservation with FTA assistance pursuant to 49 U.S.C. § 5323(q) be held for the future transit project?

Answer 19: If the ROW is acquired for corridor preservation with FTA financial assistance, FTA expects a transit project using the ROW to be implemented within a reasonable timeframe that will be specified in the grant. This grant condition will be stated in writing at the time of the grant for ROW acquisition. In determining the appropriate timeframe to specify in the grant, FTA will consult with the project sponsor and will consider the planning status of any proposed project that would use the ROW. If a transit use of the ROW does not come to pass within the timeframe specified in the grant, FTA may allow the corridor preservation to continue with a new date specified by FTA, or may require the disposition of the ROW in accordance with 49 U.S.C. § 5334(h)(1)–(3), 49 U.S.C. § 5334(h)(4), or 49 CFR § 18.31(c).

Question 20: If, after having acquired a ROW for corridor preservation with FTA financial assistance in accordance with this guidance, the project sponsor that owns the ROW decides to construct a transit project on that ROW entirely with non-Federal funding, what FTA requirements would apply?

Answer 20: FTA considers the acquisition of the ROW for corridor preservation under 49 U.S.C. § 5323(q) and the subsequent construction of a transit facility on that ROW to be separate projects. If, after having acquired a ROW with FTA financial assistance in accordance with this guidance, the project sponsor that owns the ROW decides to construct a transit project on that ROW entirely with non-Federal funding,¹⁰ the FTA requirements that are associated with FTA funding would not apply to that transit project. As previously stated in Question 14 above, the proposed encumbrance of the ROW would require FTA’s written approval. In reviewing the proposed encumbrance, FTA would consider the eligibility of the proposed transit project for FTA assistance under 49 U.S.C. Chapter 53. If the non-Federal project proposed to be constructed on the ROW is one that is not eligible for funding under 49 U.S.C. Chapter 53 (e.g.,

¹⁰ In this guidance, “to construct a transit project entirely with non-Federal funding” means that, other than the FTA funds used to acquire the ROW for corridor preservation, no Federal funds are used for any aspect of the subsequent transit project including the acquisition of vehicles or equipment, any form of construction, initial operations, etc.

a highway) and if it precludes the construction of an eligible transit facility on the ROW, then FTA would require disposition as described in Question 19 above.